EXPORT-IMPORT BANK OF MALAYSIA BHD v. HISHAM SOBRI & KADIR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN JC
[CIVIL SUIT NO: 22NCVC-121-03-2017]
19 FEBRUARY 2018

PARTNERSHIP: *Liabilities of partners – New partners – Firm of advocates and solicitors – Negligence and breach of contract – Company's cause of action stemmed from firm's act of issuing drawdown advice resulting in losses – Whether new partners were partners of firm at material time – Whether offence committed before new partners admitted as partners – Partnership Act 1961, s. 19(1) – Whether court has discretion to evaluate facts to determine liability of partner – Rules of Court 2012, O. 77 r. 4*

CIVIL PROCEDURE: *Striking out – Res judicata – Applicability – Whether instant suit one of several suits involving same subject matter – Whether cause of action obviously unsustainable – Whether action ought to be struck out – Rules of Court 2012, O. 18 r. 19(1)(a), (b) (d)*

LIMITATION: *Action – Accrual of – Starting point from which cause of action would run – Applying tests in Kamariyah Hamdan and Abdul Aziz Hassan – Whether more than six years had elapsed – Whether claim statute barred – Limitation Act 1953, s. 6(1)*

The plaintiff's cause of action against the defendant, a firm of advocates and solicitors, was for negligence and breach of contract, which arose from the defendant's alleged failure to advise the plaintiff that the eight titles ('eight Rembau Lands') were Malay Reservations lands. The charges on the eight Rembau Lands, which were registered in favour of the plaintiff, were invalid as the plaintiff was not at the material time approved under the sch. 2 of the Malay Reservations Enactment (FMS 142). Briefly, the facts were that the plaintiff and the borrower, Pt Eden Capital Indonesia, had entered into a facility agreement for a loan. As one of the securities for the loan, third party first legal charges ('the charges') between Life Paradise Sdn Bhd ('the chargor') and the plaintiff were registered on the eight Rembau Lands. By letters dated 25 July 2005 and 17 August 2005 ('Drawdown Advice'), the defendant advised the plaintiff that all the security documentations were in order for the plaintiff to drawdown the loan to the borrower. Several years later, in July 2016, plaintiff filed foreclosure proceedings in the High Court against the chargor seeking an order for sale of the eight Rembau Lands ('2016 foreclosure action'). In July 2016, the chargor filed an originating summons ('2016 Seremban OS') seeking a declaration that the charges on the eight Rembau Lands were invalid on the grounds that they were in contravention of the Malay Reservation

Enactment. The High Court in the 2016 foreclosure action dismissed the plaintiff's action while the High Court in the 2016 Seremban OS declared that the charges were invalid and ordered the Registrar of Title to remove the registration of the charges from the eight Rembau Lands. Thus, the plaintiff commenced this instant suit against the defendant. *Via* encl. 8, the new partners of the defendant applied to set aside the service of the writ of summons on them and that the writ of summons and amended statement of claim and any other proceedings as against them be struck off pursuant to O. 77 r. 4 of the Rules of Court 2012 ('ROC') based on the grounds that they were not partners of the defendant when the plaintiff's cause of action accrued against the defendant. The issues that arose were (i) whether this court has the discretion to determine whether the new partners were partners of the defendant or liable at the material time; (ii) when was the material time and (iii) whether the new partners were partners of the defendant at the material time. *Via* encl. 10, the defendant applied to strike out the plaintiff's writ of summons and amended statement of claim pursuant to O. 18 r. 19(1)(a), (b) and/or (d) under the ROC. The issues that arose were (i) whether the action was statute-barred; (ii) whether the action was barred by *res judicata.*

Held (allowing encls. 8 and 10):

(1) When a partner denies he is a partner or is liable as such at the material time, on the application of the defendant, the court has the discretion to evaluate the material facts before it and to make a decision as to the liability of the said partner (O. 77 r. 4(2) of the ROC read together with O. 77 r. 4(4)). Based on O. 77 r. 4, this court had the discretion to determine the liability of the new partners, in that, per the *dicta* in *MBF Capital Bhd & Anor v. Tommy Thomas*, whether at the material time the new partners were partners of the defendant firm. (para 19)

(2) The plaintiff's cause of action stemmed from the defendant's act of issuing the drawdown advice which resulted in the plaintiff drawing down the loan in 2005. The new partners were clearly not partners of the defendant firm in 2005. As the cause of action or the 'things' that gave rise to the cause of action against the defendant were done before the new partners were admitted as partners of the defendant, pursuant to s. 19(1) of the Partnership Act 1961, the new partners would not be liable to the plaintiff in the event this court found that the defendant was liable to the plaintiff for the alleged negligence and/or breach of contract. Thus, it was proper for this court to use its discretion to allow the new partners' application in encl. 8 to set aside the service of the writ of summons and to strike out the writ of summons and amended statement of claim against them. (paras 25-27)

(3) Applying the test of discoverability pronounced in the case of *Kamariyah Hamdan* as the starting point from which the cause of action would run, the plaintiff could have discovered the alleged breach of contract or negligence as early as 2007 from the letter dated 29 May 2007 from the Director of Land and Mines Negeri Sembilan to the defendant, in which the contents of the letter showed that the plaintiff at the time of the drawdown advice and the plaintiff's drawdown of the loan in 2005, was not yet listed in sch. 2 of the Malay Reservations Enactment. As for the test in *Abdul Aziz Hassan*, the damage would have occurred when the defendant's loss crystallised at the time the loan was disbursed to the borrower in August 2005. Time would accordingly start to run from August 2005. Notwithstanding the different tests used, the results of both tests showed that more than six years had elapsed from the accrual of the plaintiff's cause of action. Thus, the plaintiff's claim against the defendant for the alleged breach of contract and negligence was statute barred under s. 6(1) of the Limitation Act 1953. (paras 43-47)

(4) This instant suit was the fifth suit before this High Court involving the same subject matter namely the charges on the eight Rembau Lands. The plaintiff could have and should have added the defendant as a party to any one of those previous suits. On the proper application of the principle of *estoppel per rem judicatam*, *res judicata* applied to this suit. The plaintiff's cause of action against the defendant was obviously unsustainable and ought to be struck out. (paras 53-56)

Case(s) referred to:

AmBank (M) Bhd v. Abdul Aziz Hassan & Ors [2010] 7 CLJ 663 CA ***(refd)***
AmBank (M) Bhd v. Kamariyah Hamdan [2013] 5 MLJ 448 ***(refd)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Ors And Another Case [2017] 1 LNS 1014 HC ***(refd)***
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***
Lee Choon Hei v. Public Bank Bhd & Another Appeal [2017] 7 CLJ 438 CA ***(refd)***
MBf Capital Bhd & Anor v. Tommy Thomas & Anor (No. 1) [1998] 1 CLJ Supp 462 HC

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2), Schedule item 11
Limitation Act 1953, s. 6(1)
Partnership Act 1961, s. 19(1)
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d), O. 77 r. 4(2), (4)

For the plaintiff - Arief Emran Arifin & Khor Meyven; M/s Wong & Partners
For the defendant - Lim Kian Leong & Foo Siew Yin; M/s Lim Kian Leong & Co

Reported by Suhainah Wahiduddin

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JUDGMENT

Faizah Jamaludin JC:

[1] These are my grounds of judgment in respect of (i) the defendant's application in encl. 8 to set aside the service of and strike out the writ of summons and amended statement of claim on Ainihayati binti Jabit, Zalina binti Abd Malek, Helmi bin Hamzah, Ahmad Ghazali bin Mohamad Anuar and Ab Haiyee bin Abd Aziz (the "new partners"); and (ii) the defendant's application in encl. 10 to strike out the writ of summons and amended statement of claim.

Background

[2] The plaintiff is a company incorporated under the Companies Act 1965 and a development financial institution established under the Development Financial Institution Act 2002. The defendant is a partnership carrying on the practice of law as a firm of advocates and solicitors under the name and style of "Hisham Sobri & Kadir".

[3] The plaintiff's cause of action against the defendant as pleaded are for negligence and breach of contract, which arose from the defendant's alleged failure to advise the plaintiff that the eight titles referred to in para. 9 of the amended statement of claim (the "8 Rembau lands") were Malay Reservation lands. The charges on the 8 Rembau land, which were registered in favour of the plaintiff were invalid as the plaintiff was not at the material time approved under the Schedule 2 of the Malay Reservations Enactment (FMS 142) (as applicable in the State of Negeri Sembilan).

[4] The plaintiff and the borrower, PT Eden Capital Indonesia, entered into a facility agreement for a loan for the sum of USD 4 million. As one of the securities for the loan, third party first legal charges ("charges") between Life Paradise Sdn Bhd (the "chargor") and the plaintiff were registered on the 8 Rembau lands by the Registrar of Title Negeri Sembilan on 20 July 2005.

[5] By letters dated 25 July 2005 and 17 August 2005 ("drawdown advice"), the defendant advised the plaintiff that all the security documentations are in order for the plaintiff to drawdown the loan to the borrower.

[6] The plaintiff recalled the facility agreement on 10 April 2009 because of a breach of the agreement by the borrower, PT Eden.

2010 And 2011 Litigation

[7] In 2010, the plaintiff commenced foreclosure action in the Kuala Lumpur High Court Originating Summons No. S-24NCVC-344 2010 against the chargor ("2010 foreclosure action").

[8] In 2011, the chargor filed an action in the Seremban High Court Originating Summons No. 24(F)-550-2011 ("2011 Seremban OS") seeking a declaration that the charges on the 8 Rembau lands were invalid on the grounds that they were in contravention of the Malay Reservations Enactment.

[9] Both the 2010 foreclosure action and the 2011 Seremban OS were withdrawn pursuant to a settlement between the plaintiff and the chargor.

2016 Litigation

[10] The plaintiff in June 2016, filed foreclosure proceedings in the Kuala Lumpur High Court against the chargor (Originating Summons No. 24FC-555-06-2016) seeking an order for sale of the 8 Rembau lands ("2016 foreclosure action").

[11] In July 2016, the chargor filed an originating summons at the Seremban High Court (Originating Summons No. 24NCVC-168-7-2016) ("2016 Seremban OS") seeking a declaration that the charges on the 8 Rembau lands were invalid on the grounds that they were in contravention of the Malay Reservation Enactment.

[12] On 2 December 2016, the Kuala Lumpur High Court in the 2016 foreclosure action dismissed the plaintiff's action on the grounds that the registration of the charges had contravened the Malay Reservations Enactment.

[13] On 20 December 2016, the Seremban High Court in the 2011 Seremban OS declared that the charges were invalid and ordered the Registrar of Title Negeri Sembilan to remove the registration of the charges from the 8 Rembau lands.

Present Suit

[14] The plaintiff commenced this instant suit against the defendant on 7 March 2017.

Enclosure 8

[15] The new partners applied in encl. 8 to set aside the service of the writ of summons on them and that the writ of summons and amended statement of claim and any other proceedings as against them be struck off pursuant to O. 77 r. 4 of the Rules of Court 2012 ("ROC"). Their application is based on the grounds that they were not partners of the defendant when the plaintiff's cause of action accrued against the defendant.

[16] Under s. 19(1) of the Partnership Act 1961 a person who is admitted as a partner of a firm will not be liable for anything done before he becomes partner of the said firm. Section 19(1) states as follows:

> A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm **for anything done before** he became a partner.
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> (emphasis added)

[17] In considering the new partners' application, to my mind the questions before this court are:

(a) Does this court have the discretion under O. 77 r. 4 of the ROC to determine whether the new partners were partners of the defendant or liable at the material time?

(b) When was the material time?

(c) Were the new partners, partners of the defendant at the material time?

(a) Does This Court Have The Discretion To Determine Whether The New Partners Were Partners Of The Defendant Or Liable At The Material Time?

[18] Order 77 r. 4 of the ROC provides as follows:

> Entry of appearance in an action against firm (O. 77 r. 4)
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> 4.(1) Where persons are sued as partners in the name of their firm, appearance may not be entered in the name of the firm but only by the partners thereof in their own names, but the action shall nevertheless continue in the name of the firm.
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> (2) Where in an action against a firm the writ by which the action is begun is served on a person as a partner, that person, if he denies that he was a partner or liable as such at any material time, may enter an appearance in the action and state in the memorandum of appearance that he does so as a person served as a partner in the defendant firm but who denies that he was a partner at any material time. An appearance entered in accordance with this paragraph shall, unless and until it is set aside, be treated as an appearance for the defendant firm.
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> (3) Where an appearance has been entered for a defendant in accordance with paragraph (2):
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> (a) the plaintiff may either apply to the Court to set it aside on the ground that the defendant was a partner or liable as such at a material time or may leave that question to be determined at a later stage of the proceedings;
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> (b) the defendant may either apply to the Court to set aside the service of the writ on him on the ground that he was not a partner or liable as such at a material time or may at the proper time serve a defence on the plaintiff denying in respect of the plaintiff's claim either his liability as a partner or the liability of the defendant firm or both.

(4) The Court may at any stage of the proceedings in an action in which a defendant has entered an appearance in accordance with paragraph (2), on the application of the plaintiff or of that defendant order that any question as to the liability of that defendant or as to the liability of the defendant firm be tried in such manner and at such time as the Court directs.

[19] The High Court in *MBf Capital Bhd & Anor v. Tommy Thomas & Anor* [1998] 1 CLJ Supp 462; [1997] 3 MLJ 395 held that O. 77 r. 4(2) is to be read together with O. 77 r. 4(4) in that when a partner denies he is a partner or liable as such at the material time, on the application of the defendant, the court has the discretion to evaluate the material facts before it and to make a decision as to the liability of the said partner. The court held that:

To my mind, the application made pursuant to O. 77 r. 4(4) of the RHC is to be read together with O. 77 r. 4(2) in that where a partner denies that she was a partner at the material time, then pursuant to O. 77 r. 4(4), her liability or that of her firm may be tried in such manner and at such time as the court directs. In other words, this was a discretionary power given to the trial judge to evaluate the material facts before him and to make a decision.

The word 'liability' as stated in O. 77 r. 4(4) to my mind did not mean the determination of her liability per se towards the main cause of action. Since O. 77 r. 4(4) is to be read with O. 77 r. 4(2), the words 'liability' is to determine the issue whether at the material time she was a partner.

(emphasis added)

[20] Accordingly, I am of the view that based on O. 77 r. 4(4), this court has the discretion to determine the liability of the new partners in that, per the *dicta* in *MBf Capital Bhd & Anor v. Tommy Thomas*, whether at the material time the new partners were partners of the defendant firm.

(b) When Was The Material Time?

[21] The question at hand in determining whether the new partners were partners of the defendant at the material time is to determine when was the "thing done" by the firm that gave rise to the cause of action by the plaintiff against the defendant. I have in the section of this judgment dealing with the application in encl. 10 discussed the time when the cause of action accrued against the defendant by applying the tests promulgated by the Court of Appeal in two cases involving AmBank in *Abdul Aziz Hassan* and *Kamariyah Hamdan*. In respect of the new partners, the question is when was the material time ie, when was the "thing done" that gave rise to the cause of action. Section 19(1) stipulates that the new partners "will not be liable to the creditors of the firm for anything done before he became a partner."

[22] In this case, I find that the thing that was done by the defendant firm which gave rise to the plaintiff's cause of action was the issuance of the drawdown advice on 25 July 2005 and 17 August 2005.

[23] In *Lee Choon Hei v. Public Bank Bhd & Another Appeal* [2017] 7 CLJ 438; [2017] 3 MLJ 441; [2017] 3 AMR 521; [2017] AMEJ 428, the appellant was a partner of the law firm Paul Cheah & Associates from 1 July 2006 to 30 June 2008, which was sued by the respondent bank for negligence, fraud caused by forgery and breach of contract. The court awarded judgment against the law firm and the appellant applied to strike out the bank's application to execute the judgment against him on the grounds that he was a former partner of the law firm. The Court of Appeal held that as the appellant was a partner of the law firm when the forgery was committed by another partner of the firm, the appellant is liable for the judgment debt against the law firm. Harmindar Singh JCA in delivering the judgment of the Court of Appeal held that:

> [20] Relying on the judgment of the High Court dated 30 November 2012 and the order of the Court of Appeal on 5 August 2013, it is beyond dispute that the invalid act of Frankie Tan in witnessing the forged signature on the Form 16N on 19 October 2006 as partner of the defendant firm and the defendant's action in presenting the executed Form 16N for registration on 1 November 2006 directly caused the discharge of the plaintiff's charge over the property. Therefore, the relevant dates when the cause of action of the plaintiff arose against the defendant were 19 October 2006 and 1 November 2006. Since the appellant does not dispute that he was a partner on those dates, the prerequisites for leave as set out in O. 77 r. 5(4) have been satisfied and the appellant must accordingly be liable to the plaintiff for the judgment debt.

(c) Were The New Partners Partners Of The Defendant At The Material Time?

[24] The new partners averred in their affidavit supporting the application in encl. 8 that the dates of their admission as partners of the defendant are as follows:

Name	Date Of Admission
Ainihayati Binti Jabit	2007
Zazlina Binti Abd Malek	2008
Helmi Bin Hamzah	2008
Ahmad Ghazali Bin Mohamad Anuar	2011
Ab Haiyee Bin Abd Aziz	2013

[25] I find that the plaintiff's cause of action stemmed from the defendant's act of issuing the drawdown advice which resulted in the plaintiff drawing down the loan in 2005. The new partners were clearly not partners of the defendant firm in 2005.

[26] As the cause of action or the "things" that gave rise to cause of action against the defendant, were done before the new partners were admitted as partners of the defendant, I find that, pursuant to s. 19(1) of the Partnership

Act 1961, the new partners would not be liable to the plaintiff in the event this court finds that the defendant is liable to the plaintiff for the alleged negligence and/or breach of contract.

[27] For this reason, I have decided that it would be proper for this court to use its discretion to allow the new partners' application in encl. 8 to set aside the service of the writ of summons and to strike out the writ of summons and amended statement of claim against them.

Enclosure 10

[28] The application in encl. 10 is the defendant's application to strike out the plaintiff's writ of summons and amended statement of claim pursuant to O. 18 r. 19(1)(a), (b) and/or (d) under the ROC.

[29] This court is empowered under the O. 18 r. 19(1) of the ROC and under its inherent jurisdiction to strike-out the plaintiff's action against the defendant where it is plain and obvious that the plaintiff's claim is unsustainable in that (a) it does not disclose a reasonable cause of action; (b) it's scandalous, frivolous or vexatious; (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court.

[30] It is settled law that this court should only exercise its discretion to strike out an action where the action is obviously unsustainable. The oft-quoted decision of the Supreme Court in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 2 AMR 1969; [1993] 3 MLJ 36 which supports this legal principle states as follows:

> The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley M.R. in *Hubbuck v. Wilkinson* [1899] 1 QB 86, p. 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable".

[31] The plaintiff's cause of action against the defendant is for alleged negligence and breach of contract. The cause of action arose out of the defendant's alleged failure to advise the defendant that the 8 Rembau lands were Malay Reservation lands and that the charges registered in favour of the plaintiff on the 8 Rembau lands were not valid because the plaintiff at the material time was not approved under the Malay Reservations Enactment (as applicable in the State of Negeri Sembilan).

[32] The plaintiff filed this instant action against the defendant on 7 March 2017.

Is This Action Statute-barred?

[33] Section 6(1) of the Limitation Act 1953 stipulates that limitation sets in on actions founded on contract or tort after six years from the date on which the cause of action accrued. Section 6(1) states that:

> Limitation of actions of contract and tort and certain other actions
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> 6. (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
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> (a) actions founded on a contract or on tort;
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> (b) actions to enforce a recognisance;
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> (c) actions to enforce an award;
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> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

[34] In the case of *AmBank (M) Bhd v. Abdul Aziz Hassan & Ors* [2010] 7 CLJ 663; [2010] 3 MLJ 984 the appellant bank had granted a loan facility to a borrower secured by a third-party assignment, which was to be executed by an assignor over a piece of land. The land, Lot 465, was a subdivided portion of another piece of land registered in the name of the Majlis Bandaraya Ipoh. The respondent law firm was instructed by the bank to attend to the preparation of the loan documentation including the execution of the third-party assignment by the assignor. When the borrower defaulted on the loan, the bank sought to enforce the third-party assignment over Lot 465. The Majlis Bandaraya Ipoh refused to give its consent and the bank commenced action against the Majlis to compel the Majlis to consent to the sale of the Lot 465. The bank then by consent decided to withdraw the action against the Majlis because the bank was of the view that it did not have good title to Lot 465. The bank then commenced legal action against the respondent law firm on the grounds that they acted in breach of contract or were negligent in failing to advise the bank that the assignor did not have good title to Lot 465 and the third-party assignment over Lot 465 is accordingly invalid. The High Court struck out the bank's claim on the preliminary issue of limitation.

[35] The Court of Appeal in *Abdul Aziz Hassan* dismissed the bank's appeal against the striking out. It found that the third-party assignment was invalid for the simple reason that the assignor did not have a good title to Lot 465 and therefore could not have executed the third-party assignment. It held that since the third-party assignment was allegedly a void instrument, the breach of duty would have occurred at the very moment when the third-party assignment was executed.

[36] The Court Appeal held that for a cause of action founded on a breach of contract, time runs from the alleged breach. Abdul Malek Ishak JCA said the following:

> [30] According to the Federal Court in the case of *Nasri v. Mesah* [1971] 1 MLJ 32, that time begins to run for the purposes of limitation from the date of any infringement or threat of infringement of the appellant's right under the agreement. And that **a cause of action on a contract accrues on the date of breach and in the case of actions founded on contract, time runs from the breach**.
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> [33] It is our judgment that, on the facts as pleaded, the third party assignment was invalid for the simple reason that the assignor did not have a good title to Lot 465 and therefore could not have executed the third party assignment. And since the third party assignment was allegedly a void instrument, the breach of duty would have occurred the very moment when the third party assignment was executed. This would be on 6 April 1999 and it was therefore time barred. There are no two ways about it. This is our judgment and we so hold accordingly.
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> (emphasis added)

[37] For a cause of action founded on tort, the Court of Appeal held that the cause of action accrues when the appellant suffers damage. It held:

> [34] **It is trite law that a cause of action founded in tort accrues when the appellant suffers damage** (*Goh Kiang Heng v. Hj Mohd Ali bin Hj Abd Majid* [1998] 1 MLJ 615).
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> [35] According to the case of *Forster v. Outred & Co* [1982] 1 WLR 86 (CA), it was necessary to prove actual damage in order to constitute a cause of action in negligence and that on the pleaded facts the plaintiff had suffered actual damage through the defendant's negligence ...
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> [39] Applying all these salient authorities to the appeal at hand, it is our judgment that on the facts as pleaded the appellant would have suffered damage when the third party assignment was executed because the appellant would have, on that date, been encumbered with the liability of dispensing the loan to the borrower in exchange for an invalid third party assignment. *It is also our judgment, on the available evidence, that the appellant's loss would have crystallised the moment the loan sum was disbursed to the borrower in early April 1999 in exchange for an invalid third party assignment*. Time started to move from 6 April 1999.
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> (emphasis added)

[38] In the subsequent case of *AmBank (M) Bhd v. Kamariyah Hamdan* [2013] 5 MLJ 448, another panel of the Court of Appeal departed from the principle on limitation pronounced earlier in *Abdul Aziz Hassan*. In *Kamariyah Hamdan*, the bank had issued a third-party notice against a firm of solicitors alleging that they had been negligent in advising the bank to release a loan to borrower based on an invalid charge. The solicitors applied to strike out the notice on the ground that the bank's claim for contribution

A and indemnity was statute-barred as damage was suffered when the loan was released on 1 September 1997 and the third-party notice was only issued in 2006. Jeffrey Tan JCA after reviewing all the case law in this area of law, discarded the date of physical damage in favour of the date of discoverability. His Lordship said:

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> [22] Likewise, in the instant case, the appellant on 1 September 1997 could not have discovered whatever negligence on the part of the respondent by the exercise of any reasonable diligence. ... The earliest that it could be said that the appellant should have suspected possible negligence in the preparation of the charge was when the appellant was served with the writ of summons dated 24 May 2000. Only then could it be said that the
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> appellant should have discovered that the charge was under challenge ...

[39] His Lordship explained the court's departure from *Abdul Aziz Hassan* as follows:

> [23] We were invited to consider *AmBank (M) Bhd v. Abdul Aziz bin Hassan*
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> *& Ors* [2010] 3 MLJ 784 ... Dismissing the appeal, the Court of Appeal held (i) that the only test to ascertain limitation is housed in s. 6 of the Limitation Act, regardless of whether the plaintiff discovers the damage, (ii) that a cause of action in contract accrued on the date of the breach, and (iii) that cause of action in tort accrued when the appellant suffered damage, that is when the third party assignment was executed on 6 April
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> 1999.
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> [24] All except that in view of the aforesaid decisions of the apex court on the date of accrual of the cause of action, and the discoverability rule as espoused and or endorsed in Wardley, Central Trust, and Law Society, **we must respectfully decline to defer to the ruling that time would run**
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> **regardless of whether damage was or could be discovered**.
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> (emphasis added)

[40] The Court of Appeal in *Abdul Aziz Hassan* held that the limitation runs from the date on which breach of contract or when damages caused by the negligence occurred. Whereas, the Court of Appeal in *Kamariyah Hamdan*
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decided that limitation runs from when the breach of contract or negligence was discoverable.

Defendant's Case

[41] The defendant argues that in this instant case, time started to move
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from the date of the alleged breach of contract or when the plaintiff suffered the alleged damage ie, the date of execution and registration of the charges on 20 July 2005 or when the letters advising drawdown were issued on 20 July 2005 and 17 August 2005 or when the loan facility was drawdown by the plaintiff at the end of August 2005. The defendant argues that since
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this instant action was filed in 2017, more than six years have passed and this instant action is accordingly statute-barred.

Plaintiff's Case

[42] The plaintiff argues that time started to run for purposes of limitation on 2 December 2016 ie, the date the Kuala Lumpur High Court in the 2016 foreclosure action dismissed the plaintiff's application for an order for sale of the 8 Rembau lands and on 20 December 2016 when the Seremban High Court in the 2016 originating summons declared the charges invalid and void on the grounds that the charges were invalid because they were in contravention of the Malay Reservations Enactment. The plaintiff submits that its cause of action is based on its loss of ability to foreclose the 8 Rembau lands. It argues that the loss and damage only arose in December 2016 when the Kuala Lumpur and Seremban High Courts declared that the plaintiff cannot foreclose the 8 Rembau lands because of the invalidity of the charges.

When Did Time Start To Run?

(i) *Kamariyah Hamdan Test*

[43] Applying the test of discoverability pronounced in *Kamariyah Hamdan* as the starting point from which the cause of action would run, I find that the plaintiff could have discovered the alleged breach of contract or negligence as early as 2007 from the letter dated 29 May 2007 from the Director of Land and Mines Negeri Sembilan to the defendant stating that the plaintiff's application to be listed in Sch. 2 of the Malay Reservations Enactment has been approved and was in the process of being published in the *Gazette*. The c.c. on the letter shows that it was copied to the plaintiff. It is clear from the content of this letter that the plaintiff at the time of the drawdown advice and the plaintiff's drawdown of the loan in 2005, was not yet listed in Sch. 2 of the Malay Reservations Enactment.

[44] Even if the plaintiff did not discover the breach in 2007, it could have and should have discovered the alleged breach of contract or negligence during the course of the 2010 foreclosure proceedings and 2011 originating summons.

(ii) *Abdul Aziz Hassan*

[45] Applying the test set out by the Court of Appeal in *Abdul Aziz Hassan*, the cause of action for breach of contract would have accrued on the date of the allege breach of contract by the defendant ie, when it issued the drawdown advice on 25 July 2005 and 17 August 2005 advising the plaintiff that all the security documentation for the drawdown of the loan to the borrower was in order. The cause of action for the negligence would have occurred when the defendant suffered damage. Based on the decision in *Abdul Aziz Hassan*, the damage would have occurred when the defendant's loss crystallised at the time the loan was disbursed to the borrower in August 2005. Time would accordingly start to run from August 2005.

[46] Notwithstanding the different tests used namely the *Abdul Aziz Hassan* test and the *Kamariyah Hamdan* test, I find that the results of both tests show that more than six years have elapsed from the accrual of the plaintiff's cause of action.

[47] Based on the results of both tests, I find that the plaintiff's claim against the defendant for the alleged breach of contract and negligence is statute-barred under s. 6(1) of the Limitation Act 1953.

Is This Action Barred By Res Judicata?

[48] The defendant further submits that this instant action is barred by *res judicata* and issue estoppel. The essence of the defendant's argument is that the plaintiff could have and should have applied to add the defendant as a party to the 2010 foreclosure action, 2011 originating summons, 2016 foreclosure action and/or the 2016 originating summons so that all the questions relating to the charges on the 8 Rembau lands could have been argued before the High Court. However, the plaintiff chose not to do so. The defendant submits that the issues raised by the plaintiff in this action properly belonged to the 2010 foreclosure action, 2011 originating summons, 2016 foreclosure action and/or the 2016 originating summons and the plaintiff exercising reasonable diligence should have litigated these issues at that time. Counsel for the plaintiff submits that the cause of action, issues and reliefs sought in this instant action and that the 2010 foreclosure action, 2011 originating summons, 2016 foreclosure action and the 2016 originating summons are different and therefore *res judicata* does not apply.

[49] Pursuant to s. 25(2) of the Courts of Judicature Act 1964 ("CJA") this court has the discretion to strike out a suit where the matter in question is *res judicata*. Item 11 of the Schedule to the CJA provides as follows:

> *Res Judicata*
>
> 11. Power to dismiss or stay proceedings where the matter in question is *res judicata* between the parties, or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not be continued.

[50] The wider ambit and application of *res judicata* was explained in case of *Henderson v. Henderson* [1843] 3 Hare 100 by Wigram VC as follows:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the same subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[51] The practical application of Wigram VC's oft-quoted passage in *Henderson v. Henderson* was explained by Peh Swee Chin FCJ in the Federal Court in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189; [1995] 3 AMR 2559; [1995] 1 MLRA 611 as follows:

> There is one school of thought that issue estoppel applies only to issues actually decided by the Court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the Court, are still covered by the doctrine of *res judicata* ie, doctrine of estoppel *per rem judicatum*.
>
> We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata*, in other words, with the doctrine of estoppel *per rem judicatum*. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the Courts being found always one step behind the resulting increase in litigation.

[52] In *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Ors And Another Case* [2017] 1 LNS 1014; [2017] MLJU 1038 where Azizul Adnan J referred to Peh Swee Chin FCJ's explanation of the principle of estoppel *per rem judicatum Asia Commercial Finance* and went on to hold that:

> [17] There is another reason why the plaintiff's action in the new suit ought to be struck out. It is because of the proper operation of the principle of estoppel *per rem judicatum*.
>
> [20] One distinguishing feature in the cases before me is that the trial for the earlier Suit No. 51 is still in progress, and therefore there is not yet any judgment or determination of the merits of the case. Can *res judicata* still apply in such circumstances? I am of the view that this fact does not make any difference to the application of the doctrine of *res judicata* in the broader sense. This is because the rationale for the existence of the common law rule is to prevent the proliferation of litigation, taking into account the proper management of resources available to the court (see the two last sentences in the passage of Peh Swee Chin FCJ's judgment quoted above).

[53] Having considered thoroughly the facts and history of court's actions relating to the charges on the 8 Rembau lands, I find that this instant suit is the fifth suit before this High Court involving the same subject matter namely the charges on the 8 Rembau lands. The plaintiff could have and should have added the defendant as a party to any one of those previous suits.

[54] For this reason, I find that on the proper application of the principle of estoppel *per rem judicatum*, *res judicata* applies to this suit. In my judgment, it would be correct for this court to apply its discretion to strike out this suit.

Decision

[55] For the reasons above, the new partners' application in encl. 8 is allowed. The service of the writ of summons on the new partners is hereby set aside and the writ of summons and amended statement of claim are hereby struck-out against the new partners.

[56] Further, I find that the plaintiff's cause of action against the defendant is obviously unsustainable and ought to be struck out. Accordingly, the defendant's application in encl. 10 is allowed. The writ of summons and amended statement of claim are hereby struck out.

[57] Costs for both applications in encl. 8 and encl. 10 are to be paid by the plaintiff to the defendant.